

Before J V. Gupta and Amarjeet Chaudhary, JJ.

BALBIR DEWAN COLD STORAGE AND GENERAL MILLS,—
Petitioner.

versus

NAVEEN CHANDER,—Respondent

Civil Revision No. 2478 of 1988

March 9, 1989

Code of Civil Procedure (V of 1908)—O. 26—Rls. 9 and 10—Report of Local Commissioner—Objections to such report not contemplated by Rl. 10—Court cannot frame issues on matters referred to the Commissioner—Right course is to examine Commissioner personally.

Held, that sub-rule 3 comes into play after sub-rule 2 of Rule 10 of Order 26 of the Code of Civil Procedure, 1908. If under that sub rule a Commissioner is examined in Court either by the parties or by the Court, itself, then on the examination of the Commissioner, the Court may, if for reasons dissatisfied with the procedure can direct such further inquiry to be made as it shall think fit. Thus, the objections to the report of the Commissioner as such are not contemplated under rule 10. In any case, even if the objections are filed to draw the attention of the Court as to why the report of the Commissioner should not be accepted, even then the question of framing any issue in that behalf does not arise. A report of the Local Commissioner is not the subject-matter of the suit and, therefore, the framing of any issue to that effect was wholly unwarranted. (Para 4)

Further held, that parties can lead their independent evidence to prove the fact which was the subject-matter of investigation by the Local Commissioner. It is evident that the said report is not conclusive as such but it only forms part of the record. The parties will be at liberty to lead any evidence to support their case irrespective of the said report. (Para 4).

Held, that from the provisions of O. 26, Rl. 10, it is quite evident that there is no provision for inviting any objection to the report of the Local Commissioner appointed under rule 9 thereof. In case, any such objections are filed by either of the parties to draw the attention of the Court as to the inherent defects therein, the Court may consider the same and if for any reasons dissatisfied with the proceedings of the Commissioner, may direct such further inquiry to be made as it shall think fit but neither of the parties is entitled to claim any issue with respect to the report. The only provisions

under sub-rule 2 of rule 10 of Order 26 of the Code is to examine the Commissioner's personally in open Court either by the court itself or by any of the parties with the permission of the Court. (Para 4).

Petition under section 115 C.P.C. for revision of the order of the Court of Shri S. K. Dhawan, HCS, Sub Judge, 1st Class, Karnal, dated 24th September, 1988 framing the following issue on the objection petition filed by the defendant-petitioner against the report of the local commissioner and directing the defendant to produce his evidence on the issue:—

Whether the report of the Local Commissioner, dated 23rd August, 1988 is liable to be set aside? (O. P. Objector defendant).

Claim:—Suit for Partition.

Claim in Revision:—For reversal of the order of the Lower Court.

C. B. Goel, Advocate with Mr. Madan Jindal, Advocate, for the Petitioner.

Anil Khetrpal, Advocate, for the Respondent.

ORDER

J. V. Gupta, J.

(1) This petition is directed against the order of the trial Court dated 24th September, 1988, whereby on the objection petition filed by the defendant-petitioner against the report of the local commissioner an issue was framed and the defendant was directed to produce his evidence on the said issue.

(2) The plaintiff filed a suit for partition. He concluded his evidence and when the case was fixed for defendant's evidence he filed an application for the appointment of the local commissioner for demarcation of the suit property as provided under Order 26 rule 9 of the Code of Civil Procedure (for short 'the Code'). Consequently, Tehsildar, Karnal was appointed as local commissioner and he submitted his report. Objections were raised against the said report and thereafter the trial Court appointed Tehsildar (Sales), Karnal as the local commissioner who submitted his report dated 25th November, 1987. Against this report objections were filed by the defendant-petitioner. The main objections were that the local commissioner has not demarcated the land as per instructions of the Financial Commissioner and the High Court Rules:

Balbir Dewan Cold Storage and General Mills v. Naveen Chander
(J. V. Gupta, J.)

and Orders Vol. I, Chapter 1-M. He also submitted that the local commissioner has not given notice to the parties and the report was submitted in their absence. Reply to the objection petition was filed by the plaintiff-respondent who took up the plea that the local commissioner has demarcated the suit land strictly in accordance with the above provisions of law and notice was given to the defendant-objector who was present and an affidavit to this effect is on the file. So there is nothing to set aside the report of the local commissioner. The objections have been filed just to delay the proceedings in the case.

The trial Court framed the following additional issue on the point of the report of the local commissioner :

“Whether the report of the local Commissioner dated August 23, 1988 is liable to be set aside.”

O. P. Objector-defendant.

Dissatisfied with the same the defendant has filed this petition in this Court.

(3) According to the learned counsel for the petitioner, the objections should have been decided first before directing the parties to lead evidence on this issue. While sitting singly certain judgments were cited on behalf of the petitioner in support of the said contention. After considering the said judgments, I was of the view that it requires re-consideration because the said practice of inviting objections, framing issue and calling for evidence was against the provisions of Order 26 rules 9 and 10 of the Code. Not only that, this practice unnecessarily delays the proceedings which was not unwarranted by the provisions of the Code. Consequently, the case was referred to a larger Bench to resolve this conflict. It is how this case has come up on reference before this Bench.

(4) The learned counsel for the petitioner submitted that though there may not be any specific provisions for inviting objections under rule 10 of Order 26 of the Code, if a Commissioner is appointed under rule 9 of Order 26 of the Code but a reading of rule 10 thereof as a whole does contemplate that the objections may be filed against the report of the local commissioner. According to the learned counsel, this is necessary in the larger interest

so that the Court may form its opinion on the basis of the objections, as to whether the said report should form part of evidence in the suit or not. According to the learned counsel, this long-standing practice could not be said to be without any reason. In support of this contention, he referred to *Ram Gopal v. Pawan Kumar* (1), *National Institute of Sports v. Preminder Singh and others* (2), *Waryam Singh and another v. Lachhman Dass and others* (3), *Ashutosh and another v. R. C. Dey and others* (4), and *Harbhajan Singh v. Smt. Shakuntla Devi Sharma and another* (5). On the other hand, the learned counsel for the respondent cited *Jawahar Lal v. Mangu Ram* (6), to contend that no such objections are contemplated under rule 10 of Order 26 of the Code. In *Ram Gopal's case* (supra) a view has been taken by this Court that the objections against the report of the local commissioner have to be disposed of first because if it is not done, it would not be possible to dispose of the case at the final arguments and if the objections are sustained at that time the parties will have to be given a fresh opportunity to lead evidence which is bound to result in delaying the proceedings. This point as such, as to whether the objections against the reports could be filed or not, was not decided therein. Similarly, in *National Institute of Sports' case* (supra) also, no such argument was raised. It was simply observed therein that "it is not disputed that the petitioner did file objections against the report of the Local Commissioner. It is also not disputed that the petitioner was not afforded any opportunity to lead evidence in support of the objections. The impugned order of the trial Court, upholding the report of the Local Commissioner, cannot be sustained." As regards *Waryam Singh's case* (SAO No. 52 of 1962) (supra) the learned Single Judge observed that "admittedly Order 26 rule 10, Civil Procedure Code, which deals with the appointment of local Commissioners, does not specifically make any provision for objections by the parties to his report, but it is certainly a well established practice to invite and dispose of such objections." Thus, in none of the cases of this Court, the matter as such has been decided. In *Ashutosh's case* (supra) the Patna High Court in para 5 of the judgment observed, "I do not think that there is any warrant

(1) 1983 Haryana Rent Reporter 6.

(2) 1982 Current Law Journal, 677.

(3) S.A.O. No. 52 of 1962 decided on 4th February, 1986.

(4) A.I.R. 1953 Patna 133.

(5) A.I.R. 1976 Delhi 175.

(6) 1988 (2) P.L.R. 139.

Balbir Dewan Cold Storage and General Mills v. Naveen Chander
(J. V. Gupta, J.)

for this assumption in law or fact. When objections are filed to the commissioner's report, the objections generally challenge the correctness of the report on one ground or another. Under sub-rule (3) of R.10, it becomes necessary for the Court to consider whether there are any reasons for being dissatisfied with the proceedings of the commissioner and to decide whether a further enquiry should be made or not. In deciding that question, the Court has to consider the correctness or otherwise of the Commissioner's report on the materials then available to the Court. An order rejecting the objections or confirming the report of the commissioner does not mean that the Court has abdicated its functions and has decided a fact in issue solely on the report of the commissioner and in advance of or irrespective of any other relevant evidence bearing on the question. I do not think that the Court is at all precluded from considering the report of the commissioner again in the light of such fresh materials as may be legally brought into the record by the parties to the action. Sub-rule (2) makes it quite clear that the report of the commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record; the Court, or with the permission of the Court, any of the parties to the suit may examine the commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, etc. It is obvious that when the Court rejects certain objections to the commissioner's report, it is not precluded from examining the commissioner at a later stage either 'suo motu' or at the instance of any of the parties to the suit; nor does the Court preclude itself from considering the report of the commissioner in the light of such other evidence as may be given by the parties to the suit." In para 6 thereof the Court further observed that "the matter may also be looked at from the point of view of convenience. If the consideration of the report of the commissioner is deferred till the hearing of the suit, any defect discovered in the report of the commissioner would necessitate an adjournment or postponement of the hearing and the parties will be put to further expenses of an adjourned or postponed trial. It is not, therefore, right to say that the practice arose by reason of a mistaken analogy based on the provisions of rules 13 and 14 of Order 26. It seems to me that the practice arose, because it was convenient to deal with technical objections to the commissioner's report at an earlier stage in order to determine if there were any reasons to be dissatisfied with the proceedings of the commissioner and if a further enquiry was necessary or not." In *Harbhajan Singh's case* (Supra), it was

held that "since the Commissioner has not been examined by the Authority, the tenant obviously had no opportunity to assail the report or the manner in which the investigation had been carried out. This could have been done by the tenant only by filing objections to the report which the tenant did and that being so, it was obligatory on the Authority to deal with the objections. The report and the material submitted along with it could have been used for the purpose of the proceedings only after the objections had been overruled." It is, therefore, evident from the abovesaid judgments that the question as such was never considered, as to whether the objections as such were maintainable and if so, whether the Court could frame issue, and direct the parties to lead evidence on those issues. As observed earlier, in *Waryam Singh's case* (supra) the learned Single Judge himself observed that Order 26 rule 10 of the Code which deals with the appointment of the local Commissioners does not specifically make any provision for objections by the parties to Commissioner's report, but certainly it is a well established practice to invite and dispose of such objections. Under Order 26 of the Code, Local Commissioners are appointed for different purposes and the procedure prescribed for that is also differently provided. If the Local Commissioner is appointed under Order 26 rule 13 of the Code to make partition of immovable property, rule 14 thereof provides for hearing any objection which the parties may make to his report. Similarly, if the Local Commissioner is appointed to examine or adjust accounts under rule 11, under sub-rule (2) of rule 12, the proceedings and report of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit. As regards the Commissioner to be appointed under rule 9 of Order 26 of the Code, rule 10 thereof provides the procedure for that. Sub-rule (2) of rule 10 further provides that "the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation." Sub-rule (3) of rule 10 is in the following terms:

"Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

**Balbir Dewan Cold Storage and General Mills v. Naveen Chander
(J. V. Gupta, J.)**

Sub-rule (3) comes into play after sub-rule (2) of rule 10 of Order 26. If under that sub-rule a Commissioner is examined in Court either by the parties or by the Court, itself, then on the examination of the Commissioner, the Court may, if for reason dissatisfied with the procedure can direct such further inquiry to be made as it shall think fit. Thus, the objections to the report of the Commissioner as such are not contemplated under rule 10. In any case, even if the objections are filed to draw the attention of the Court as to why the report of the Commissioner should not be accepted, even then the question of framing any issue in that belief does not arise. A report of the Local Commissioner is not the subject matter of the suit and, therefore, the framing of any issue to that effect was wholly unwarranted. That unnecessarily delays the matter. In that situation, as observed by Patna High Court in the judgment referred to above, the parties can lead their independent evidence to prove the fact which was the subject matter of investigation by the Local Commissioner. According to rule 10, reports of the Commissioner shall be evidence in the suit and shall form part of the record. It is, therefore, evident that the said report is not conclusive as such but it only forms part of the record. The parties will be at liberty to lead any evidence to support their case irrespective of the said report. In an earlier case reported as *Jawahar Lal's case* (supra) this matter was considered by this Court and it was observed in para 5 thereof that "Order XXVI rule 8 Code of Civil Procedure, deals with the Commissioners to make local investigations. Sub-rule (2) of rule 10 thereof provides that the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. Thus, there is no provision for filing objections to such reports made by the local Commissioners. Even otherwise, if objections are allowed to be filed to such like reports made by the local Commissioners, then there will be no other way to find out the exact position of the site, in dispute. The inspection by the local Commissioner is made in the presence of the parties. Therefore, the said report is to be ordinarily accepted by the Court appointing the local Commissioner unless any inherent defect could be pointed out therein." Thus, from the provisions of Order 26 rule 10, it is quite evident

that there is no provision for inviting any objection to the report of the local Commissioner appointed under rule 9 thereof. In case, any such objections are filed by either of the parties to draw the attention of the Court as to the inherent defects therein, the Court may consider the same and if for any reasons dissatisfied with the proceedings of the Commissioner, may direct such further inquiry to be made as it shall think fit but neither of the parties is entitled to claim any issue with respect to the report. The only provisions under sub-rule (2) of rule 10 of Order 26 of the Code is to examine the Commissioners personally in open Court either by the Court itself or by any of the parties with the permission of the Court. The objection, if filed by the parties, shall be considered after the cross-examination, if any, of the local Commissioner by the Court under rule 10 of Order 26 of the Code and that too along with the other evidence at the time of final hearing.

(5) Consequently, this petition succeeds and the impugned order is set aside. However, it will be open to the parties to examine the Local Commissioner as provided under sub-rule (2) of rule 10 of Order 26 of the Code.

(6) Since the further proceedings were stayed by this Court at the time of motion hearing, the parties are directed to appear before the trial Court on March 16, 1989. As the suit is pending in the trial Court since July, 1984, it is directed to expedite the hearing of the same. It is also directed that the evidence, if any, will be produced by the parties at their own responsibility for which one opportunity will be given to each party to conclude the same.

R.N.R.

Before G. C. Mital and S. S. Sodhi, JJ.

SONEPAT IRON AND STEEL ROLLING MILLS, SONEPAT,—
Applicant.

versus

THE COMMISSIONER OF INCOME TAX, HARYANA,—
Respondent.

Income Tax Reference No. 35 of 1982

April 5, 1989.

Income Tax Act (XLIII of 1961)—Ss. 139(4), 153(1)(b)(c), 153(1)(a)(iii), 271(1)(c)—Assessee claiming false deductions—Fact brought